

#L-655

Memorandum 86-18

Subject: Study L-655 - Estates and Trusts Code (Probate Referee  
questionnaire)

PURPOSE OF MEMORANDUM

This memorandum analyzes the responses the Commission received on its probate referee questionnaire, which was circulated during the Summer of 1985. The objective of the analysis is to give the Commission, in useable form, the additional information the Commission requested to assist it in making policy decisions concerning what changes, if any, the Commission wishes to propose in the probate referee system.

BACKGROUND

The Commission commenced active consideration of the probate referee system in June 1985. At that time the Commission had before it substantial background information and numerous letters concerning the system. The Commission also heard oral presentations by a number of persons and organizations, including the California Probate Referees Association, a representative of Assembly Judiciary Committee Chairman Elihu Harris, the Legislative Committee of the Probate, Trust, and Estate Planning Section of the Beverly Hills Bar Association, the Executive Committee of the State Bar Estate Planning, Trust and Probate Law Section, and the California Bankers Association.

The Commission expressed a need to gather more information concerning possible improvements in the probate referee system. The Commission directed the staff to make inquiry of interested persons and organizations (including local bar associations) concerning specific proposals that had been suggested for improvement of the probate referee system. Suggestions included removal of a probate referee by peremptory challenge, requiring backup appraisal data upon request, and allowing self-appraisal of publicly-traded stock.

The staff prepared a questionnaire that listed all suggestions for improvement of the probate referee system the Commission had

received up to that time. The questionnaire also solicited comments and additional suggestions. Return of the questionnaire was requested by the end of September 1985. A copy of the blank questionnaire is attached as Exhibit 1.

The staff distributed the questionnaire to all persons and organizations that had corresponded with the Commission concerning the probate referee system, as well as to persons who had asked to receive Commission materials relating to probate law (including a number of local bar associations). The staff also had the questionnaire published in the State Bar's estate planning newsletter.

#### QUESTIONNAIRE RESPONSES

The Commission received 115 responses to the questionnaire, of which nearly half included written comments on the responses or written suggestions for alternate improvements in the system. Many questionnaires that were returned responded to some, but not all, of the questions.

Of the 115 responses, 8 were from organizations. These organizations are:

- State Bar Estate Planning, Trust and Probate Law Section  
(the questionnaire response includes a composite of members of the Executive Committee together with other experienced probate lawyers to whom individual Executive Committee members had circulated the questionnaire)
- Los Angeles County Bar Association Probate and Trust Law Section  
(a composite of Executive Committee responses)
- San Diego County Bar Association Subcommittee on Probate and Trust Legislation
- Kern County Bar Association Probate and Estate Planning Section  
(6 members of the Section combined responses)
- San Luis Obispo County Bar Association  
(questionnaire returned by association President who appears to be speaking as an individual, though on association letterhead and signed as association President)
- California Probate Referees Association
- California Bankers Association
- California Appraisers Council

Of the other 107 responses, 5 were from judges or commissioners, 3 from public administrators, 7 from individual probate referees, 2 from legal assistants, 1 from a trust company, 1 from an appraiser, and the remaining 86 from practicing lawyers. In tabulating

responses, the staff kept a tally of different categories of respondent, including those who had written to the Commission previously in general support of the probate referee system. In presenting data below, the staff does not distinguish among categories except where there appears to be a strikingly great and statistically significant difference among them.

The most lawyer responses came from some of the more populous counties:

<u>County</u>	<u>No. of Responses</u>
Los Angeles	17
Riverside	13
Santa Clara	11
San Francisco	10
Alameda	8
Stanislaus	7
Orange	6
Sonoma	4

Other counties were represented as well, including one or two responses from each of the following: Contra Costa, Fresno, Imperial, Kern, Marin, Plumas, San Diego, San Joaquin, San Luis Obispo, San Mateo, Santa Barbara, and Yuba.

#### GENERAL COMMENTS

A couple of the questionnaires were returned with remarks of a general nature about the law reform process itself. One lawyer gave the questionnaire a vote of support--"I feel the Commission is on the right track. Keep up the good work." Another admonished the Commission to proceed with care--"I urge you to go very cautiously in changing a system that currently works." A third was wary of too much change:

Hopefully the Commission may continue to propose changes which will simplify the handling of estates. The rules now are changing so often that it is hard for the practitioner to keep up with them. Fairness is very important, yet the multiplying of complicated rules and regulations will have the effect of requiring clients to pay for the extra work and defeat the intent of the testator in having his estate pass economically and speedily. A careful balance between these two goals must be achieved.

## PROBATE REFEREE SYSTEM

The questionnaire made clear that the Commission is interested at this stage of the study only in specific suggestions and comments relating to improvement of the probate referee system (as opposed to comments on the need or lack of need for the system itself in probate). Nonetheless, there were a number of unsolicited comments attached to the returned questionnaires speaking to the basic probate referee system.

Fourteen of the questionnaire responses (including 3 submitted by individual probate referees) noted strong support for the basic probate referee system, subject to some changes and improvements. The following comments are typical:

"The present system works very well in El Dorado County."  
(Superior Court judge)

"We strongly support the probate court referee system as a low-cost appraisal system. We desire to see it continue with the changes discussed in this letter." (Kern County Bar Association)

"Overall, everyone on our subcommittee is favorable toward the Probate Referee system but we all realize there are specific problems that arise either with the valuation of a particular asset or with a particular probate referee. Certainly typical problems such as these should not be an indictment against the entire Probate Referee system. For the most part, the probate referees in San Diego County are extremely helpful and do an independent as well as a timely and accurate job in appraising assets." (San Diego County Bar Association)

"As a long-time probate attorney, I can assure you that there is seldom unanimity among the personal representatives, heirs, devisees and legatees regarding values, if they have any idea in the first instance. The lack of an independent appraisal by a duly appointed referee will certainly lead in many instances to problems particularly with taxing authorities long after the estate is closed. That may very well lead to a question of the personal liability of probate counsel and the personal representative. Finally, it has been my experience that heirs, devisees and legatees are almost unanimously more satisfied that they have received their fair distributive share of an estate when it has been independently appraised by a probate referee at very little cost to the estate." (individual probate referee)

On the other hand, there were also 6 unsolicited questionnaire responses to the effect that the probate referee system should be abolished or at least use of the probate referee made optional. For example:

"Having administered several estates and worked with many probate referees, I think the best change to the probate referee system would be to eliminate it. Since the inheritance tax has been repealed, there is little reason to have probate referees. They usually accept the value suggested by the personal representative. There is no impact on the estate, except in the amount of the statutory compensation, from the probate referee appraisal. The extra time and sometimes delay in dealing with the referees supports the proposal to eliminate the current system. Replacing the system with an Inventory and Appraisement prepared by the personal representative and distributed to the beneficiaries, who can object, should be sufficient." (practicing lawyer)

"In my opinion, the best way to deal with the various problems addressed by the enclosed questionnaire is to substitute self-appraisal of all probate assets by the personal representative ...Such a system would simplify the appraisal process and enable the representative to deal promptly and effectively with a dilatory or incompetent appraiser. Appraisal fees would be incurred only when and to the extent services of an expert are necessary....I have practiced law, mostly probate in this county for 59 years and served as an inheritance tax appraiser for 31 years." (practicing lawyer)

"Use of a Probate Referee should be only when a beneficiary seeks one to challenge personal representative's self-appraisal. Should be akin to notice of proposed action in Independent Administration." (practicing lawyer)

Finally, one lawyer raised the question whether the probate referee system should be retained, but suggested that the Commission reserve the question. He pointed out that, "Petitions for Waiver of Probate Referee are increasing in number. The experience of the courts in dealing with estates which have opted for self-appraisal should provide data as to whether the Referee system really needs to be retained. I would leave things 'as is' for a couple of years to see how they work [except for a few immediate changes]."

#### 1. HOW TO DEAL WITH INCOMPETENT REFEREE

The first set of items on the questionnaire concerned the problem of how to deal with an incompetent referee. The questionnaire prefaced the three items by stating that a number of persons have noted that a significant problem with the probate referee system is the inability to deal adequately with an individual referee who is not doing the job properly.

Although one respondent (practicing attorney) stated he has "had no problems" with incompetent referees, the others who addressed this issue felt it was a problem. Typical comments were:

- "We believe that incompetent and/or unresponsive referees represent a significant problem that is not being addressed by the present system." (Los Angeles County Bar Association)
- "It would be helpful to have an effective method for removal of a referee." (San Luis Obispo County Bar Association)
- "Incompetent referees as well as those who are merely lazy or slow, result in unnecessary delay and expense." (California Bankers Association)

1(a). ACTION BY STATE CONTROLLER

The first questionnaire suggestion for dealing with the incompetent referee was: "(a) Require State Controller to receive and act upon recommendations of referees association concerning disciplining or removing referee." Of the 95 responses to this suggestion from individual respondents and of the 8 responses from organizations, the tally was:

	<u>Yes</u>	<u>No</u>
Individuals:	53 (55.8%)	42 (44.2%)
Organizations:	Kern County Bankers Los Angeles County San Luis Obispo State Bar	Probate Referees Appraisers Council San Diego County

The comments supporting this suggestion were lukewarm. San Luis Obispo, for example, finds the suggestion "acceptable", but notes that it "would need to be supplemented by some other form in order to make removal easier and less time consuming." Kern County believes it would be useful because, "The referees association does not appear to be disciplining or investigating referees now. We feel it would be a good system for the referees association to receive comments and complaints about referees and to make recommendations to the State Controller." A practicing lawyer notes that the Controller should be given discretion, however.

The comments opposed to this suggestion include that it would be a waste of time because of "the lengthy proceedings that would be necessary to prove such claims" (San Diego County) and that the Controller already has adequate authority to discipline and remove.

One practicing lawyer states, "I have little or no faith in the State Controller effectively acting to remove or discipline an incompetent referee. These appointments are political." Another states, "I am opposed to placing any authority in such state officers as the Controller rather than the local court. The Controller's office is too remote and it takes ages to get responses from it. Control and supervision should be as close to the local level as possible both for efficiency and an ability to understand the particular local situation." Finally, "Since the referee's association is not an official organization under state law, requiring the Controller to act on its recommendations would seem to raise problems." (Inheritance Tax Attorney responding as individual and not on behalf of Controller).

1(b). COURT REMOVAL FOR CAUSE

The second questionnaire suggestion for dealing with the incompetent referee was: "(b) Provide procedure for court removal of referee for cause upon petition by estate. 'Cause' would mean incompetence or delay in this context." Of the 100 individual and 8 organization responses to this suggestion, the tally was:

	<u>Yes</u>	<u>No</u>
Individuals:	83 (83%)	17 (17%)
Organizations:	Kern County Bankers Probate Referees Los Angeles County Appraisers Council San Luis Obispo County State Bar	San Diego County

The affirmative comments on this suggestion noted that it would provide local jurisdiction and control (individual probate referee), and that "it is not only an effective remedy, but one which will be well known to all involved in the probate system and one which will not be misused because of the formality involved in preparing a petition for removal." (San Luis Obispo) The California Bankers Association states that, "While the Court should have the power to remove referees, we believe that the Court will be willing to do so only in extreme cases."

Negative comments were to the effect that the court already has inherent power to remove the referee and that the referee is an agent of the court and should be removable in the court's discretion for any reason. Again, the San Diego County Bar believes that removal by petition to the Probate Court "is and would be a waste of everyone's time and money because of the lengthy proceedings that would be necessary to prove such claims."

Advocates of a court removal procedure also offered a number of refinements of the procedure. The Probate Referees Association suggested that in the case of incompetence, removal be left to the State Controller, but that in the case of delay in the performance of duties with respect to a given estate, the estate should be allowed to petition the court for removal of the referee from that estate. One lawyer felt that removal proceedings should be commenced only after prior communication between the estate's attorney and the referee as to the reasons for the delay and any problems that exist. The Kern County Bar Association felt that the "incompetence" or "unreasonable delay" that would amount to cause for removal should be defined: "We feel that it should be a fairly extreme situation before removal is warranted." And a practicing lawyer pointed out that if "cause" must be established in the particular case involved, "it will not be particularly helpful, since the delay which is the most frequent problem will have already occurred. If such a procedure is to be established, it must provide that 'cause' can be established based upon prior dealings with that particular referee."

#### 1(c). PEREMPTORY CHALLENGE

The third questionnaire suggestion for dealing with the incompetent referee was: "(c) Provide procedure for challenge and removal without cause of the FIRST referee assigned by the court in the particular case upon affidavit of the estate, similar to peremptory challenge of judge by affidavit." The tally of 100 individual and 8 organization responses is as follows:



	<u>YES</u>	<u>NO</u>
Individuals	69 (69%)	31 (31%)
Organizations	Kern County Bankers Probate Referees Los Angeles County Appraisers San Diego County State Bar	San Luis Obispo County

It should be noted that among persons with whom the Commission did not have previous contact (i.e., persons who had not previously written to the Commission expressing general support for the probate referee system), the preference for this proposal was quite strong, with 45 (77.6%) in support and 13 in opposition (22.4%). Also, this proposal was favored by the State Bar Executive Committee but not by any substantial margin by the group to whom Executive Committee members circulated the questionnaire.

The comments in support of this proposal included:

"We think that a peremptory challenge is a more practical step toward dealing with the problem." (California Bankers Association)

"In Los Angeles County, the personal representative may ask the court to refrain from appointing any referee with an office at a particular address. This informal peremptory challenge often permits the personal representative to avoid the worst referees. Since a party may peremptorily challenge one judge, why not one referee?" (Los Angeles County Bar Association)

"The best way to keep referees doing a good job is to permit challenge of first referee assigned without cause. This would weed out the bad ones quickly." (practicing lawyer)

The only negative comment was from San Luis Obispo County Bar Association, which was concerned that the peremptory challenge "could tend to be overused and misused in a manner similar to peremptory challenges of trial judges." The Kern County Bar Association, while supporting the proposal, also noted that, "we hope the procedure will not be abused."

There were a couple of improvements suggested to this proposal. The California Probate Referees Association supported the proposal with the qualification that the affidavit of challenge should be filed within 10 days after notification of the referee's appointment. A

number of respondents also pointed out the need to deal with or provide a procedure for the situation in a small county where there is only one probate referee.

1(x). OTHER SUGGESTIONS FOR INCOMPETENT REFEREE

A number of questionnaires included alternate suggestions for dealing with the incompetent referee problem. These suggestions may be grouped into several different categories:

(1) Require better qualifications to begin with. A number of respondents felt better qualifications for referees would cure many of the problems:

"Appointments should be based more on merit and qualifications-- as they were before Alan Cranston took over the Controller's job and politicized the system." (practicing lawyer)

"The problems lie not so much in the system as in the referees appointed. Most are not qualified--most of them do not do the work themselves. Prior to Mr. Cory's time in office, most referees were well qualified--most of them attorneys--and the system worked well. Strict qualifications should be established for referees and the appointment power removed from the State Controller's office." (practicing lawyer)

"Referees should cease to be State Controller appointees. Probate judges should select from list of persons qualified (i.e., CPA's, brokers, attorneys, classic car dealers, art experts, etc.)." (practicing lawyer)

"The members of the Council expressed deep concern in respect to a continuation of the political appointment ... aspects of the present Probate Referee System; processes which invite abuse. The California Appraisers' Council is interested in contributing to the improvement of the California Probate System. The establishment of an independent, objective, and responsive body of qualified appraisers via an appraiser licensing system in the State of California is the recommended approach." (California Appraisers' Council)

(2) Allow estate to request specific referee. Two practicing lawyers suggested that the personal representative be authorized to select the probate referee for the estate. One makes an extensive case for this suggestion:

I would suggest that some consideration be given to allowing the estate to select the probate referee to be appointed in a particular case. If it were relatively easy to waive the official appointment of a probate referee, it would be quite simple to select your probate referee on a de facto basis. This could be done by having the appointment of an official probate referee waived and then engaging the services of the desired probate referee in an unofficial capacity as an appraiser.

I feel that allowing the estate to select the probate referee to be appointed would encourage prompt and accurate work by the probate referees. I firmly believe that the probate attorneys would base their decisions upon the speed with which a particular probate referee completes the appraisals and the quality of the work done by the probate referee. If there is concern that this procedure would lead to abuse and an attempt to use the ability to select your own referee to influence appraisals, I feel this could be handled through an established review process within the Referee's Association or the Controller's office. In any event, most probate attorneys would realize that it is foolish to use an appraiser who continually undervalues assets in light of the severe penalties imposed by the Internal Revenue Code for undervaluation of assets.

In any event, the lawyer who made this argument believes that it would be very helpful if the estate could request a specific probate referee where the property in an estate or a substantial portion of it has just been through the probate process. This happens where a conservatee has died and the property must be probated or where the surviving spouse dies shortly after the first spouse. "In those situations, it would very often save a great deal of time if the same probate referee were appointed in the subsequent proceedings, since that referee has already conducted a relatively recent review of the assets involved." This is analogous to a suggestion noted below that a probate referee be waived as to particular assets if those assets have already been appraised, for one reason or another.

(3) More control by the court/Controller. Several respondents noted that the probate court, together with the State Controller, should exercise greater supervision of the probate referees. "The presiding judge in each county should have the authority to remove a referee and call upon the controller to name a replacement."

(4) More activity by Referees Association. The California Bankers Association notes that "more self-discipline by the referees association" would be helpful. This comment is echoed by the Los Angeles County Bar Association, which observes that, "While we understand that the referees association does not have the power to dismiss an incompetent referee, we feel that peer pressure and censure can be effective tools."

(5) Open appraisal to competitive market forces. One practicing lawyer makes an argument for allowing the estate a choice between the appointed probate referee or another competent appraiser:

Please permit the attorneys and their clients to avoid (or get rid of) an incompetent referee by new procedure. The incompetent referee will either shape up or go out of business by this natural process. Free competition would be great here. Referees who provide good service at a reasonable fee will always be in demand. If the fees are increased, attorneys and their clients should be permitted by new procedure to have their appraisals made by other appraisers who can provide quality work at lower fees.

## 2. PROCEDURE FOR WAIVER OF APPOINTMENT OF REFEREE

The second set of items on the questionnaire concerned the procedure for waiver of the probate referee. The questionnaire prefaced the six items by stating that the existing statutory waiver procedure has been criticized because it is confusing and it entails additional court and attorney time to administer. One respondent (superior court judge) took issue with this "criticism", stating that, "I do not believe the present procedure for waiver is in any way confusing or unnecessarily time consuming. The time is minimal."

A number of respondents took the position that no changes in the waiver procedure are appropriate. This was the position of the San Luis Obispo County Bar Association:

I support the present method of waiver and do not feel that its "liberalization" is beneficial. I have always been a supporter of the referee/inheritance tax appraiser system, which we have enjoyed in California over the past decades. I feel it provides a reliable and standardized method of asset appraisal throughout the state and permits attorneys and clients to have ready access to knowledgeable valuation. Experience has taught that appraisals should be left to those experienced in the area, rather than to professionals who may unjustifiably feel that they can value assets. I have seen attorneys, clients and probate paralegals over and over again value assets in a completely incorrect manner. I believe that any method which will make it "easy" to eliminate the referee will simply become overused to the detriment of those involved in the probate process, whether it be attorneys or, more importantly, estate beneficiaries. All too often, the beneficiaries are frightened by the cost of probate and will take any means possible to minimize expenses. Certainly, a simple way to eliminate the relatively modest expense of a probate referee will become widely used. However, I feel that this would be a false economy because of my belief that the probate referee system provides tremendous benefit to estates and the beneficiaries thereof.

The California Probate Referees Association would go even further and eliminate the present waiver provisions completely. They state:

No waiver should be allowed. After much reflection, study, discussion and review, the Association takes the position that any waiver is inappropriate. The Referee fees are in the nature of an assessment which should be paid by all estates except those with cash assets. The Probate System is a protective system and should remain such. Persons who have total faith in the ability of their attorneys, beneficiaries and trustees to carry out their wishes without Referee and Court involvement have many vehicles for avoiding probate. When there is a probate, however, the Judge has a responsibility to the estate which requires independent Referee appraisals. The protections of our Probate System, including the role of the Referee as a mandatory element, should remain as an essential element of probate.

The position of the California Appraisers' Council appears somewhat inconsistent. They oppose any change in the existing waiver system--the suggestions "tend to afford an opportunity to complicate an orderly system which is beneficial". On the other hand, they also state that the estate administrator "should either work completely with the referee system or, on a discretionary basis, choose a qualified appraiser to value any or all of the estate assets that he (or she) does not wish to have the referee appraise."

Notwithstanding the foregoing comments, there was substantial support in the questionnaire responses for some improvements in the existing waiver system, as set out below.

2(a). WAIVER PETITION MUST HAVE PROPOSED INVENTORY ATTACHED

The first questionnaire suggestion for improving the waiver procedure was: "(a) Petition for waiver would have attached to it a proposed inventory, which would become the inventory on file if waiver is granted and would be superseded by referee's inventory if waiver is denied." Of the 97 individual and 6 organization responses to this item, the tally is:

	<u>Yes</u>	<u>No</u>
Individuals	52 (53.6%)	45 (46.4%)
Organizations		Kern County Probate Referees Los Angeles County Appraisers San Diego County State Bar

It should be noted that although a fairly strong majority of the State Bar Executive Committee did not favor this item, a majority of the persons to whom Committee members circulated the petition did. The matter was discussed at some length in the Executive Committee and it was observed that it is frequently not possible to know early in the proceedings (when a waiver would be sought) what the proper total inventory is. "In general, we thought such a procedure would be awkward to carry out in many estates and, thus, do not recommend such a process."

The Kern County Bar Association also had a similar split of opinion after quite a lot of time discussing this question, the majority view being "no" for the following reasons:

(1) If the personal representative or another interested person valued the assets, the valuation is inherently suspect. The majority felt there would be too many opportunities for abuse.

(2) It is unclear who could object to the petition. As a practical matter, we foresee few objections which makes abuse more likely.

(3) If a person wanted to object, how could he acquire sufficient information to be well enough informed to object? All of the information may be in the personal representative's hands which is not disclosed to the objector.

(4) What criteria would the court use to determine whether the proposed inventory should be accepted?

The minority view was "yes", provided the proposed inventory states the value of the assets at the time the petition is filed and the petition and inventory are sent to all interested parties, rather than just a notice of hearing.

Some of the same concerns were reflected in other questionnaire responses, which included such comments as "too complicated", "vague", and "appears to be already covered" by existing law. Another concern was that the proposed inventory "could well turn out to be an approximation or estimation if prepared quickly or early on in the proceedings."

#### 2(b). WAIVER PROCEDURE SIMILAR TO INDEPENDENT ADMINISTRATION

The second questionnaire suggestion on waiver procedure was: "(b) Permit petition for waiver of referee at time of initial petition for appointment of personal representative in same manner as petition for

independent administration. If waiver is granted, inventory and appraisal would be served by personal representative on interested persons in the same manner as notice of advice of proposed action. Any interested person could object to inventory and appraisal and then appraisal by a probate referee would be required." Of the 104 individual and 8 organization responses to this suggestion, the tally is:

	<u>Yes</u>	<u>No</u>
Individuals	59 (56.7%)	45 (43.3%)
Organizations	Bankers	Kern County
	Los Angeles County	Probate Referees
	State Bar	Appraisers
		San Luis Obispo County
		San Diego County

The State Bar reported a "rather strong majority" of both the Executive Committee and the others to whom the questionnaire was circulated in favor of this proposal.

Comments in support of the proposal included:

"We like the idea of treating a petition for waiver of referee much like a petition for authority to administer the estate under the Independent Administration of Estates Act. Permitting heirs to object to the inventory as they would object to an advice of proposed action gives them an easy way to require a referee's appraisal if they have any question about the personal representative's appraisal." (California Bankers Association)

"We favor permitting the personal representative to petition for waiver of a referee in the same manner as he or she petitions for authority to used independent administration. If the beneficiaries are served with the inventory and can require appraisal by a referee merely by objecting to the inventory, much like objecting to an advice of proposed action, their interests are protected." (Los Angeles County Bar Association)

The Probate Referees Association, on the other hand, felt that if there is to be any waiver procedure at all, it should only be allowed by petition after a referee has been appointed. "There are 3 estates known to the Association in which a Petition to Waive has been filed and Objections have been filed by the appointed Referee. They were in San Mateo, Los Angeles and San Diego Counties and all three Courts sustained the Objections and denied the Petition. The Referees must be doing something right when 3 different Judges in 3 different counties sustained the Referee system after the pitfalls of waivers in each of these estates were brought to the attention of the court."

Other concerns with the suggested procedure are that there is no protection of having the court decide whether the inventory and appraisal should be accepted (Kern County Bar Association) and that it is too complicated (practicing lawyer). Two comments also noted the burden on the estate of preparing an inventory and appraisal only to have a subsequent objection and appointment of a probate referee. The San Diego County Bar Association observes that, "A denial of the Waiver for Appointment of the Referee is not tenable if it can be made after the personal representative has made the Inventory. It is a waste of time to have the Inventory prepared by the personal representative only to be denied at a later time."

There was also one suggestion for improvement of the proposal, made by an individual probate referee, who supported the proposal but would prefer it to read--"Inventory and Appraisal must be served by personal representative on all interested persons ...".

2(c). NOTICE OF PETITION FOR WAIVER

The third item relating to improvement of the waiver procedure was: "(c) Shorten time of notice of petition from 15 days to 10 days." Of the 91 individuals and 7 organizations responding to this question, the tally is:

	<u>Yes</u>	<u>No</u>
Individuals	39 (42.9%)	52 (57.1%)
Organizations	State Bar	State Bar
		Kern County
		Probate Referees
		Los Angeles County
		Appraisers
		San Luis Obispo County
		San Diego County

The State Bar is listed above as yes and no, since the Bar "was divided pretty much 50-50 in each group which indicated that nobody thought it was a very significant issue." It should also be noted that although the Los Angeles County Bar Association opposed this item, individual attorney responses from Los Angeles showed support by a margin of greater than 2 to 1.



In support of reducing the notice of waiver period from 15 days to 10 days, one practicing lawyer observed that, "The same time limit as for most other probate petitions would seem sufficient for a petition for waiver of probate referee." Two other practicing lawyers suggested going beyond shortening time to eliminate notice altogether--"allow the petition ex parte - many courts do so now."

On the other hand, the Kern County Bar Association felt that 15 days is short enough and one practicing lawyer felt that 15 days was not enough.

2(d). BURDEN OF PROOF FOR WAIVER

The fourth suggestion relating to improvement of waiver procedures was: "(d) Reverse burden of proof on petition for waiver: petition would be granted unless interested person showed good cause to deny." Of the 97 individuals and 6 organizations responding to this item, the tally is:

	<u>Yes</u>	<u>No</u>
Individuals	61 (62.9%)	36 (37.1%)
Organizations	Bankers San Diego County	Kern County Probate Referees Appraisers San Luis Obispo County

The general responses on this question were substantially more favorable than the responses by persons selected in favor of the probate referee system, by a margin of 42 (76.4%) to 13 (23.6%).

The State Bar Executive Committee also submitted a response (the Executive Committee was split but there was a decided "yes" advantage in the group to whom they circulated the questionnaire), but felt that there was an ambiguity in the question so that the results obtained in the survey are not meaningful and should be disregarded. "In general, it was felt that the present requisite of showing a reason for waiver of a referee is still a valid requirement."

The Kern County Bar Association echoed this sentiment, feeling that "there should be good reason for any granting of the petition." These thoughts were repeated by two practicing lawyers, who also noted that the facts were in the possession of the personal representative and therefore it is appropriate that the personal representative

should bear the burden. "Furthermore, it would seem incongruous to place the burden of proof on the independent disinterested referee rather than the personal representative of the estate who not only has an interest, but most likely a conflict of interest."

2(e). PERMIT WILL TO WAIVE REFEREE

The fifth item under waiver procedures was: "(e) Permit waiver of probate referee by will, in same manner as bond waiver." We received 103 individual and 8 organization responses on this item, as follows:

	<u>Yes</u>	<u>No</u>
Individuals	45 (43.7%)	58 (56.3%)
Organizations	Bankers	Kern County
	San Diego County	Probate Referees
	State Bar	State Bar
		Los Angeles County
		Appraisers
		San Luis Obispo County

The State Bar is listed yes and no because of approximately a 50-50 vote on this item. Again, general responses were more favorable than probate referee related responses, by a margin of 37 (61.7%) to 23 (38.3%).

In support of the proposal, one practicing lawyer observes, "In general as a drafter of Wills and Trusts and attorney for probate matters I favor the widest possible latitude that a testator may elect in the processing of his estate. Some want supervision and careful checks and balances. Others have the greatest confidence in the chosen executor and want the widest discretion used." This lawyer goes on to argue that waiver should be allowed except where the decedent has not selected the personal representative--e.g., an administrator or administrator with the will annexed selected by the court. "In these cases the greatest degree of scrutiny should be required."

Opposed to the proposal, several commented that a waiver provision would probably become standard in wills, with testators not fully understanding the ramifications. "We suspect that it could become automatic by some will drafters and find its way into the boilerplate of most wills. The decision should be made at the time of the testator's death and not when the will is drawn." (Kern County Bar Association) Another practicing lawyer was concerned that waiver in the will would expose the attorney to too much risk.

1(f). WAIVER BY BENEFICIARIES

The sixth item relating to waiver procedure was: "(f) Permit waiver by all heirs or devisees in same manner as waiver of bond or accounting." There were 101 individual and 8 organization responses to this suggestion, as follows:

	<u>Yes</u>	<u>No</u>
Individuals	76 (75.2%)	25 (24.8%)
Organizations	Bankers	Kern County
	Los Angeles County	Probate Referees
	San Diego County	Appraisers
	State Bar	San Luis Obispo County

The State Bar noted that both the Executive Committee and the persons to whom they had circulated the questionnaire supported this proposal "by a fairly strong majority." It should also be noted that among general respondents (non probate referee oriented), there was a substantial margin of support for this proposal, 51 (87.9%) to 7 (12.1%).

The Kern County Bar Association was split over this question, the majority answering "no" because:

(1) There is no protection for the less informed or weak-willed heir. The problem of an heir being able to acquire information in order to be informed enough to object is present here. The majority viewed the procedure as creating a situation which could easily be abused.

(2) Basis considerations are so important that a qualified appraiser is preferable to any self-appraisal system.

(3) Heirs may agree to a low value merely to lower attorney's fees.

The Los Angeles County Bar Association commented in favor of waiver by interested persons:

We also favor permitting all beneficiaries to waive appointment of a referee as they can with respect to accountings and the posting of bond. In many estates, a referee is unnecessary and an expense that the beneficiaries would be happy to avoid. If they can waive bond and waive accountings where they trust the personal representative, who is usually the surviving spouse or another family member, they should also be able to waive the appointment of a referee.

Similar comments were also made by the California Bankers Association.

One suggested improvement of this proposal came from the minority of the Kern County Bar Association that favored the proposal. They would require that the inventory already be prepared with values stated for the assets, and that it be attached to the waiver at the time the waiver is signed by the heirs.

### 3. ITEMS SUBJECT TO APPRAISAL BY REFEREE

The third set of items on the questionnaire related to the particular assets to be appraised by the probate referee. The questionnaire noted that perhaps the greatest number of suggestions for improvement the Commission had received concerned liquid assets that might well be appraised by the personal representative. The questionnaire also cautioned that removal of some of these assets from the probate referee could likely result in an increase in fees for appraisal of the remaining assets, or an increase in fees any time an appraisal is made by a probate referee.

A number of the questionnaire respondents took the position that no assets should be removed from the referee, for a number of reasons. The San Luis Obispo Bar Association believes that it is "confusing and a bit 'nit picking' to have individual items detailed which are subject to self appraisal."

The Probate Referee's Association takes the position that a list of specific items should not be included in the code. They point out that, "The present fee structure is based upon the present practice of self appraisal for cash items and Referee appraisal for non-cash items. The Referees Association has published guidelines which have appeared in CEB books for years and they have worked well. It is not likely that any specific exclusions would provide any significant improvement in appraisal practice."

A number of respondents are also concerned that erosion of the probate referee's fee base will cause substantial problems for the system:

"It is necessary to keep in mind that for the referee system to work efficiently, the job needs to provide sufficient income to attract qualified individuals. Adding to the list of self-appraised items may well cause a reduction in the income, and therefore, competency of referees in general."  
(San Luis Obispo County Bar Association)

"Any further reduction in the referee's annual gross fees will, in my opinion, result in the resignation of experienced Referees - especially Attorneys, Accountants, and Real Estate Brokers/Appraisers - who are finding themselves - since the elimination of the Inheritance and Gift Tax - merely fee (.1%) appraisers." (individual probate referee)

"Since the probate referee's only source of remuneration is the appraisal fee, any reduction of the fee base should be accompanied by an increase in fee rate and minimum." (Inheritance Tax Lawyer as individual and not on behalf of Controller)

On the other hand, there was also general support for the concept of removing certain assets from probate referee appraisal. A typical comment is, "It is generally helpful to have the probate referee available for appraisals, but wasteful to have them appraise items readily valued, such as cash, securities on public markets, etc., and items not within their expertise. The estate, subject to beneficiaries' objections, should be allowed to use the referee as needed." (practicing lawyer)

Nor were all respondents impressed by the argument that the probate referee needs the easy-to-appraise items in order to survive. The California Bankers Association, for example, observes that, "It may be true that referees rely on the windfall fees from these items. However, we would prefer to see referees receive a reasonable fee for items that require some effort or expertise to appraise, rather than relying upon fees for items that need no appraisal or for merely copying the appraisal of an independent appraiser." This is also the position of the Los Angeles County Bar Association--"We would prefer to see higher fees for items that should be appraised by referees than to have them rely upon receiving fees for items that require no effort or expertise to value."

### 3(a). SELF-APPRAISAL OF CASH EQUIVALENTS

The first questionnaire suggestion for refining the items subject to appraisal by the referee was: "(a) Expand items to be self-appraised by personal representative to include all checks and other cash equivalents, such as:

checks and drafts dated after decedent's death  
cash dividends  
bond coupons that mature after decedents death  
cash in brokerage accounts  
refund checks and lump sum payments of life insurance proceeds  
treasury notes, bills, and bonds  
tax refunds  
refunds on utilities  
money market accounts"

Questionnaire responses favored this proposal by one of the widest margins of any item on the questionnaire. Of the 99 individuals and 8 organizations responding to this item, the tally was:

	<u>Yes</u>	<u>No</u>
Individuals	88 (88.9%)	11 (11.1%)
Organizations	Kern County Bankers Los Angeles County Appraisers San Diego County State Bar	Probate Referees San Luis Obispo County

In addition, 7 other respondents favored this proposal in general, but suggested that one or more items be excluded from the list; this is discussed below. The State Bar also reported "a strong majority" in favor of this proposal, and this was "the one item which received unanimous approval" from the Executive Committee members of the Los Angeles County Bar Association.

Comments in support of the proposal included:

- "In general, if the value can be easily determined, we feel the item should be able to be self-appraised." (Kern County Bar Association)
- "Permitting a referee to charge a fee for 'appraising' checks and other cash equivalents is ludicrous. These items can easily be valued by the personal representative; there is no need for a referee to appraise them." (California Bankers Association)
- "At the present time the information for appraisal of the items set forth in this suggestion to be self-appraised by the personal representative is provided to the probate referee by the personal representative." (practicing lawyer)
- "I already do this and have seldom been challenged." (practicing lawyer)

The Probate Referees Association comments, on the other hand, that "all of the items listed could, under certain circumstances, have values different from the face value."

Although there was general support for self-appraisal of cash equivalents, a number of supporters indicated specific items on the list that should not be self appraised. These items were:

<u>Item</u>	<u>Times Mentioned</u>
treasury notes, bills, bonds	7
bond coupons that mature after decedent's death	4
cash dividends	2
cash in brokerage accounts	1
money market accounts	1

Reasons given were that treasury notes and bond coupons may have a discounted value that should be appraised (Kern County Bar Association), and that cash dividends on stocks that are X-dividend and accrued interest on bonds should be valued by the person responsible for valuing the underlying security (practicing lawyer).

### 3(b). PUBLICLY LISTED SECURITIES

The second suggestion relating to items appraised by the referee was: "(b) Expand items to be appraised by personal representative to include securities listed on an established stock or bond exchange in the United States." A total of 105 individuals and 8 organizations responded as follows:

	<u>Yes</u>	<u>No</u>
Individuals	67 (63.8%)	38 (36.2%)
Organizations	Kern County Bankers Los Angeles County Appraisers San Diego County State Bar	Probate Referees San Luis Obispo

General respondents were substantially more in favor of this item than probate referee-related respondents, by a margin of 48 (81.4%) to 11 (18.6%).

Comments in support of the proposal included:

"It is not difficult to determine these values through a stock service." (Kern County Bar Association)

"There are many matters which the attorney for probate can evaluate without the need of a probate referee such as stock values on issues traded on the major stock exchanges." (practicing lawyer)

"There should be more flexibility in those cases where the referee's services are not needed, e.g., where an independent appraisal has been done, where stock values are listed on public exchange, etc. There should be no reason for duplicate services." (legal assistant)

Opposed to the proposal was a comment from an Inheritance Tax Attorney (as an individual and not on behalf of the Controller) that, "Mistakes can easily be made in this area, especially when there is no trading on the appraisal date, or when ex-dividend dates, stock splits or accrued interest are involved."

Two supporters of the proposal offered refinements. One suggestion was that either the testator before death or all the heirs after death could dispense with the formalities that would otherwise be required. Another was simply that the personal representative have discretion in each case whether to self-appraise the securities or refer them to the referee for appraisal.

### 3(c). PARTIAL WAIVER AS TO SPECIFIC ITEMS

The third suggestion relating to items to be appraised by the referee was: "(c) Keep items to be appraised by probate referee the same, but permit waiver of probate referee as to specific items, i.e. a partial waiver." This suggestion received close to the lowest level of support of any on the questionnaire. The 94 individuals and 7 organizations responded to this suggestion as follows:

	<u>Yes</u>	<u>No</u>
Individuals	33 (35.1%)	61 (64.9%)
Organizations		Kern County Probate Referees Los Angeles County Appraisers San Diego County San Luis Obispo County State Bar

Negative comments include that this "would lead to more (not less) confusion and problems" (individual probate referee). The Probate Referee's Association also notes that in the few instances where waivers have been opposed by the probate referee and denied by the court, "all involved either inaccurate or the distinct possibility of inaccurate appraisals in the event the Referee was waived. They vividly pointed out not only the possibility but the probability of less than accurate appraisals if an independent appraisal is not obtained from a Referee."



There were a number of refinements suggested for this proposal. One is to allow a partial waiver only in the judge's discretion. Another is to permit the partial waiver but, rather than to allow self-appraisal, require the personal representative to employ qualified experts.

The San Luis Obispo County Bar Association suggests a limited sort of partial waiver by permitting certain items such as checks, cash dividends, and similar cash equivalents to be self appraised by filing an election at the time the inventory is filed. The election would have the effect of partially waiving the need for a referee's appraisal of those items if circumstances were felt to warrant such a waiver. "In other words, my suggestion would be that the waiver only be permitted to affect the need for appraisal of certain specified items and that the waiver would not be automatic but would depend upon an affirmative waiver signed by either the estate fiduciary and/or beneficiaries at the time the inventory is filed."

### 3(d). WAIVER FOR UNIQUE ITEMS

The fourth suggestion relating to items appraised by the probate referee was: "(d) Allow partial waiver, but only as to specific items that are unique and require an expert, such as art collections and other special collections, to be appraised at expense of estate rather than at the expense of the probate referee." Of the 97 individual and 7 organization responses, the tally is:

	<u>Yes</u>	<u>No</u>
Individuals	48 (49.5%)	49 (50.5%)
Organizations		Kern County Probate Referees Los Angeles County Appraisers San Diego County San Luis Obispo County State Bar

The negative responses appear to be for a variety of reasons. The San Diego County Bar Association is concerned about the estate having to pay a double fee in this situation. Another concern expressed by a practicing attorney was that the personal representative should not be limited to unique assets avoiding probate referee appraisal:

Allowing a partial waiver as to specific items which are unique and require an expert would be consistent with the current practice in Stanislaus County of the estate obtaining an appraisal for any unusual or unique items such as jewelry, coins, stamps, equipment, etc. at its own expense and supplying the appraisal to the probate referee. Partial waiver should also be allowed, however, as to any item for which there is a monetary value not requiring an appraisal by the probate referee.

There was commentary in support of the proposal also. One practicing lawyer felt that the executor should be able to choose to have certain items like precious stones and antiques appraised by a professional appraiser, and the referee should be compelled to follow the appraisal of a licensed appraiser provided that the estate will pay for the extra work.

### 3(e). WHERE PUBLIC ADMINISTRATOR IS INVOLVED

The fifth suggestion relating to items appraised by the probate referee was: "(e) Eliminate probate referee appraisal in favor of personal representative appraisal as to all items in the estate where the public administrator is the personal representative." This proposal received the least support of any on the questionnaire. The 101 individual responses and 7 organization responses were:

	<u>Yes</u>	<u>No</u>
Individuals	21 (20.8%)	80 (79.2%)
Organizations		Kern County Probate Referees Los Angeles County Appraisers San Diego County San Luis Obispo State Bar

It should be noted that the poll among non-probate referee related responses was not so one-sided--18 (32.7%) to 37 (67.3%). The State Bar indicated that this item was "very strongly opposed."

The basic opposition to this item was that the public administrator is not competent to act as an appraiser. Typical remarks were "we do not feel that the public administrator is qualified to appraise assets", "public administrators are not that competent", "it would seem very important to protect against conflict of interest in this situation, witness the unfortunate incidents

involving public administrators during the past decade or two". Several commentators saw no reason to treat the public administrator any differently from any other personal representative—"In fact, the very burden of his work makes it difficult for his office to be as careful as a good executor."

One public administrator respondent suggested a modification of the proposal to allow the public administrator to appraise all conservatees' estates without the aid of the probate referee if the estate does not exceed the current SSI/MediCal level of \$1,600. The public administrator points out that existing law requires all conservatee estates above \$50 to be appraised at a minimum fee of \$75. "This creates a hardship on those that can least afford it. Especially when the Public Guardian is the one doing the basic inventory work for the appraiser."

#### 4. MISCELLANEOUS MATTERS

Under miscellaneous matters, the questionnaire listed two suggestions intended to make the referee more accountable for the appraisal, in the event the appraisal is questioned or contested. On this general matter, the Probate Referees Association states:

There is no question but that Referees should be required to provide backup report on valuation of a particular item and to justify the appraisal in the event of a subsequent contest of the valuation, such as a tax audit. However, some situations may result in substantial time and effort by the referee and therefore he or she should have the right to petition for additional fees which can be awarded in the Judge's discretion, assuming the estate is still open. If the estate has been closed, the Referee should be entitled to a reasonable fee in certain circumstances by agreement with the person requesting the backup material or justification for the appraisal.

As analysis of the specific questionnaire items below will reveal, this position pretty much corresponds to that of most of the respondents--the referee should provide backup data and support but should be adequately compensated for extra work. The Los Angeles County Bar Association response is typical:

We feel strongly that referees should be required to provide backup material to explain a valuation that is questioned by a beneficiary, the court or the Internal Revenue Service. Particularly when there is a tax audit, the referee's assistance

is critical, and the refusal to assist on the part of a referee can result in additional taxes, interest and penalties to be borne by the estate. If the justification of the valuation involves meetings with auditors or otherwise requires a significant amount of time, the referee should receive additional compensation.

The San Luis Obispo County Bar Association suggests that in the rare instances where backup reports would be time consuming, a method could be devised to provide additional compensation similar to extraordinary fees for fiduciaries. The standard would be that the compilation and providing of the backup material is of a "non routine" nature.

#### 4(a). REQUIRING BACKUP REPORT

The first item relating to questioned or contested appraisals was: "(a) Require referee upon demand to provide backup report on valuation of a particular item, such as listing of comparable sales used." This suggestion elicited the greatest positive response of any item on the questionnaire. A total of 103 individuals and 8 organizations responded as follows:

	<u>Yes</u>	<u>No</u>
Individuals	93 (90.3%)	10 (9.7%)
Organizations	Kern County Probate Referees Bankers Los Angeles County Appraisers San Diego County San Luis Obispo County State Bar	

The State Bar noted strong support for this item. And several practicing lawyers stated that in their jurisdictions the probate referees already do this if the valuation is questioned.

There were numerous comments indicating the need for adequate compensation to the referee for additional work. There were also a number of suggested refinements of the proposal:

(1) Referees would provide data and methods used, if not a full detailed report.

(2) There should be a time limit the probate referee is required to keep the information to coincide with the maximum length of time within which a tax audit could be conducted after the appraisal.

(3) The requirement should be restricted to processing the assets in a California probate proceeding, not in connection with federal estate tax disputes with the Internal Revenue Service.

#### 4(b). REQUIRING JUSTIFICATION IN CASE OF CONTEST

The second item relating to the referee's accountability for the appraisal was: "(b) Require that referee justify appraisal in case of a subsequent contest of the valuation, such as tax audit." There were 98 individual and 7 organization responses to this item, as follows:

	<u>Yes</u>	<u>No</u>
Individuals	75 (76.5%)	23 (23.5%)
Organizations	Kern County Bankers Probate Referees Los Angeles County San Diego County State Bar	Appraisers

This item was "strongly supported" by the State Bar.

The California Bankers Association comments on this item were typical:

Referees should be required to support their appraisals if a valuation is subsequently challenged. In most cases, that will only require that the referee make available to the personal representative copies of backup materials, such as comparable sales figures. In cases where the referee is required to testify or appear in court or at an audit, the referee is entitled to be compensated. However, where the personal representative relies upon a referee's appraisal, he or she should not be left in the lurch by the referee's refusal to substantiate the appraisal.

Other supporting comments included, "This seems a simple thing to do and I understand it is done anyway--at least it should be." (Superior Court judge)

There was opposition to the proposal on several grounds:

"The referee is not retained by the estate to be an expert witness in peripheral matters and, therefore, should not be required to justify appraisals in those instances unless an adequate fee is provided for the additional services." (Inheritance Tax Lawyer responding as individual and not for Controller)

- "[The proposal seems] to require the referee to provide justification of the appraisal at the time of appraisal which would create additional work for the probate referee which might never be needed and probably would entail an additional cost for the estate." (practicing lawyer)
- "The probate referee should be excluded from involvement between the estate and the federal tax auditor. The referee should be involved only in the California proceeding." (private appraiser)
- "Referees papers should be confidential and Referees should not be required to meet, confer, testify etc. for Federal Estate Tax Audits." (individual probate referee)

There were also several suggested modifications of the proposal. One individual probate referee wrote to suggest that if the referee's valuation is questioned at a hearing, the County Counsel should be appointed as the referee's attorney "since referee is an officer of the court." The Kern County Bar Association suggests that the referee be required to offer the estate the option of a full MAI appraisal for a higher fee where it is desired by the estate. If the referee is not an MAI appraiser, the estate should have the option of hiring an outside MAI appraiser to appraise it.

THE QUESTIONNAIRES ALSO INCLUDED A NUMBER OF SUGGESTIONS THAT DO NOT CORRESPOND TO ANY OF THE PREVIOUS CATEGORIES, AND THEREFORE ARE DISCUSSED BELOW AS "MISCELLANEOUS" MATTERS.

#### 4(u). REFEREE FEE SCHEDULE

There were a number of concerns expressed about the referees' fees, based on a percentage of the value of the estate. The Probate Referees Association offered the following philosophical justification of the system:

We also think that the Referee's appraisal fee should be viewed as a form of assessment, sometimes requiring larger estates to subsidize this system so that all estates may benefit from this independent service. This is a result of the fact that the Referee is not paid by local or state government but by the fees generated by the appraisals. Referees are required to maintain independent offices, pay rent, postage, telephone expenses and paralegal and appraisal assistants. The probate appraisal system will continue to work efficiently on a low cost basis, particularly to smaller estates, if the Referee's services are of a mandatory nature and the fees are uniformly paid by all estates subject to the Referee appraisal.

This basic viewpoint was disputed by a number of individual and organization respondents. A typical observation made by a practicing lawyer is, "It is fundamentally unfair to require people with easily appraised assets (e.g. stock on NYSE) to subsidize appraisal fees for people with difficult assets (art work). Should have different fee schedules and either let representative appraise the easy stuff or pay a very low fee."

There was also concern expressed in the questionnaires about the ethical problems inherent in the concept of a fee schedule (as opposed to compensation based on the reasonable value of services). The California Appraisers Council expressed "deep concern" in respect to the percentage fee aspects of the present system. And a practicing lawyer (who had served as an inheritance tax appraiser for 31 years) remarked that an appraiser's fee based on the amount of the appraisal "is fundamentally wrong; it would not be tolerated in private business." He went on to observe, however, that he had never encountered a situation where he felt an estate appraisal had been influenced by the fee. (But, as another practicing lawyer points out, there would also be a conflict of interest in the case of self-appraisal of an estate, since the personal representative and lawyer fees are also based on the value of the estate.)

One practicing lawyer had quite a different perspective on fees, stating, "I strongly believe that even under the present setup the provision for the referee's compensation is inadequate and unwise....How can the referees afford the time properly necessary to check 'comparables' for a commission of only 1/10 of 1%? ... If the compensation is inadequate I suppose we will end up getting about what we are willing to pay for."

#### 4(v). WHERE APPRAISAL DONE PREVIOUSLY

A number of respondents were concerned about having to take the time and pay for the cost of a probate referee's appraisal of assets that have already been appraised by a qualified appraiser for one reason or another. They suggest in this situation that a waiver is appropriate.

#### 4(w). TIME FOR APPRAISAL

The Kern County Bar Association felt there should be a requirement that the referee complete the valuation of the inventory and appraisal within 90 days after its delivery to the referee. "If he fails to comply with this requirement, there should be some sort of economic sanction, such as a reduced fee, and the right to have him removed by the court."

#### 4(x) CONTEST OF VALUATION

The Kern County Bar Association observes that there is no procedure for contesting a valuation by the referee. They suggest that the personal representative be required to mail the inventory to persons who have filed a request for special notice and those persons be given 20 days to object. The personal representative, a creditor, or a beneficiary could object to the values stated. A procedure similar to the old inheritance tax referee system for challenging values could be used.

#### 4(y). STANDARDIZED VALUATION METHODS

One Superior Court judge wrote that the problem of justification of the probate referee's valuation seemed to him the most troublesome in his two years of handling the probate calendar. In contested situations the probate referee had to satisfy the Court that the appraisal was more than a "guess" or a quick look, especially in those cases where the contestant had an independent appraisal that was based on a variety of factors and showed that a detailed study of the asset, the neighborhood, economic factors (gross income, gross expenses, etc.), comparable sales and so forth, for example where the asset was commercial real property. "It would seem to me that there should be more standardized methods of appraising real property than there appeared to be."



4(z). VALUATION OF GUARDIANSHIP/CONSERVATORSHIP ESTATES

One practicing lawyer stated that the system of referees might be changed for probate estates but "should be kept more or less intact for conservatorships and guardianships." He offers no reasoning underlying this opinion.

Respectfully submitted,

Nathaniel Sterling  
Assistant Executive Secretary

EXHIBIT 1

0019b

CALIFORNIA LAW REVISION COMMISSION QUESTIONNAIRE  
concerning  
SUGGESTIONS FOR IMPROVEMENT OF PROBATE REFEREE SYSTEM

The California Law Revision Commission seeks your views concerning a number of specific suggestions that have been made for improvement of the probate referee system. For each item below, please indicate whether you approve or disapprove of the suggestion. Check "Yes" if you approve; check "No" if you disapprove. Consider each item individually; do not select for approval only the item you most favor and indicate that you disapprove the other items unless you actually do disapprove them.

We encourage you to attach a separate sheet containing written comments that elaborate your position on one or more of the items; these comments would be most helpful to us. Also, if you have specific suggestions for improvement of the probate referee system that are not listed below, we would appreciate hearing them.

Please return this questionnaire by September 25, 1985, to California Law Revision Commission, 4000 Middlefield Road, Rm. D-2, Palo Alto, California 94303-4739. Please attach any comments you may have concerning your responses and any additional suggestions.

Your name: \_\_\_\_\_  
Address: \_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_

1. How to deal with incompetent referee. A number of persons have noted that a significant problem with the probate referee system is the inability to deal adequately with an individual referee who is not doing the job properly. The following suggestions address this problem:

(a) Require State Controller to receive and act upon recommendations of referees association concerning disciplining or removing referee. YES NO  
\_\_\_\_\_

(b) Provide procedure for court removal of referee for cause upon petition by estate. "Cause" would mean incompetence or delay in this context. YES NO  
\_\_\_\_\_

(c) Provide procedure for challenge and removal without cause of the first referee assigned by the court in the particular case upon affidavit of the estate, similar to peremptory challenge of judge by affidavit. YES NO  
\_\_\_\_\_

2. Procedure for waiver of appointment of referee. The existing statutory procedure for waiver of appointment of a probate referee in cases where it is appropriate has been criticized because it is confusing and it entails additional court and attorney time to administer. Suggestions for improvement of the waiver procedure include:

(a) Petition for waiver would have attached to YES NO  
it a proposed inventory, which would become the inventory  
on file if waiver is granted and would be superseded by \_\_\_ \_\_\_  
referee's inventory if waiver is denied.

(b) Permit petition for waiver of referee at  
time of initial petition for appointment of personal  
representative in same manner as petition for independent  
administration. If waiver is granted, inventory and  
appraisal would be served by personal representative on \_\_\_ \_\_\_  
interested persons in the same manner as notice of advice  
of proposed action. Any interested person could object to  
inventory and appraisal and then appraisal by a probate  
referee would be required.

(c) Shorten time of notice of petition from 15 \_\_\_ \_\_\_  
days to 10 days.

(d) Reverse burden of proof on petition for  
waiver: petition would be granted unless interested \_\_\_ \_\_\_  
person showed good cause to deny.

(e) Permit waiver of probate referee by will, \_\_\_ \_\_\_  
in same manner as bond waiver.

(f) Permit waiver by all heirs or devisees in \_\_\_ \_\_\_  
same manner as waiver of bond or accounting.

3. Items subject to appraisal by referee. Perhaps the greatest number of suggestions for improvement the Commission has received relate to liquid items that could be appraised by the personal representative. It should be noted that elimination of some of these items from appraisal by the probate referee probably would require an increase in fees for the remaining items or an increase in fees any time an appraisal is made by the probate referee.

(a) Expand items to be self-appraised by personal YES NO  
 representative to include all checks and other cash  
 equivalents, such as:

- checks and drafts dated after decedent's death
- cash dividends
- bond coupons that mature after decedent's death
- cash in brokerage accounts \_\_\_\_\_
- refund checks and lump sum payments of life \_\_\_\_\_  
     insurance proceeds
- treasury notes, bills, and bonds
- tax refunds
- refunds on utilities
- money market accounts

(b) Expand items to be appraised by personal  
 representative to include securities listed on an estab- \_\_\_\_\_  
 lished stock or bond exchange in the United States. \_\_\_\_\_

(c) Keep items to be appraised by probate referee  
 the same, but permit waiver of probate referee as to \_\_\_\_\_  
 specific items, i.e. a partial waiver. \_\_\_\_\_

(d) Allow partial waiver, but only as to specific  
 items that are unique and require an expert, such as art \_\_\_\_\_  
 collections and other special collections, to be appraised \_\_\_\_\_  
 at expense of estate rather than at the expense of the  
 probate referee.

(e) Eliminate probate referee appraisal in favor  
 of personal representative appraisal as to all items in \_\_\_\_\_  
 the estate where the public administrator is the personal \_\_\_\_\_  
 representative.

4. Miscellaneous matters. In case the probate referee's appraisal is questioned or contested, the following suggestions are intended to make the referee more accountable for the appraisal.

(a) Require referee upon demand to provide backup report on valuation of a particular item, such as listing of comparable sales used.	YES	NO
	___	___

(b) Require that referee justify appraisal in case of a subsequent contest of the valuation, such as a tax audit.	___	___
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PLEASE ADD COMMENTS AND ADDITIONAL SUGGESTIONS